

**OPEN RECORDS AND MEETINGS OPINION
2003-O-09**

DATE ISSUED: August 27, 2003

ISSUED TO: Paul T. Schadewald, Chief, Administrative Services Division,
North Dakota Game and Fish Department

CITIZEN'S REQUEST FOR OPINION

Denis Friedt made a timely request for an opinion under N.D.C.C. § 44-04-21.1 asking whether the North Dakota Game and Fish Department (Department) violated the open records law when it asked him to put his request for copies of records in writing and whether it unreasonably delayed responding to his request. There is also an issue about whether the charge for the records was reasonable.

FACTS PRESENTED

In late February 2003, Mr. Friedt asked the Department for records of the locations of prairie dog towns in the state. A person at the Department told Mr. Friedt that the Department does not provide the information.

On March 24, 2003, Mr. Friedt again asked the Department for this information. He was told the Department had concluded it was no longer appropriate to distribute a guide to the locations of prairie dog towns after receiving criticism from landowners about unwanted inquiries from shooters who wanted to hunt prairie dogs on their land. In addition, the Department informed Mr. Friedt it did not have a current list with specific locations. A consultant had conducted a survey for the Department and recorded the locations and boundaries of prairie dog towns using certain software, survey methods, and mapping tools, including global positioning system (GPS), geographical information system (GIS), Arc Info, latitudes and longitudes. The consultant produced a report showing the general location of prairie dog towns, but the report did not indicate specific locations. The Department asked Mr. Friedt to put his request in writing so the Department could determine if the information existed in the requested format and calculate the cost of providing the information.

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On April 7, 2003, Mr. Friedt advised the Department that the state open records law did not require him to put his request in writing. In light of his response, staff discussed various mapping techniques most useful to Mr. Friedt. The Department representative agreed to inquire whether there was a list of "prairie dog colonies in North Dakota mapped using a GPS unit in latitude and longitude format." Mr. Friedt was advised it might take additional staff time to generate the information requested and he would be notified prior to sending him the information if the extra work was done.

Department staff spent 30-45 minutes discussing the issue and searching computer data bases, software, and paper files. They concluded the information did not exist in the form requested by Mr. Friedt, but determined the information could be generated from certain computer data. The Department decided to generate the information. The Department reported that it took over two hours of staff time to respond to Mr. Friedt's request.

On April 15, Mr. Friedt was advised that the information had been generated and the associated costs (including postage) equaled \$25.87. Mr. Friedt picked up the information and paid \$25.87. There were five pages listing the prairie dog town locations for which he was charged 10 cents per page. He was also charged 37 cents for postage and \$25 for the second of two hours of staff time to get or develop the information. The estimated actual cost to the Department of copies is 2 cents per copy which covers expenses of a copier lease, supplies, and paper. There was no estimate of labor costs.

ISSUES

1. Whether the Department violated the open records law when it initially denied the request for information.
2. Whether the Department violated the open records law when it asked Mr. Friedt to put his request in writing.
3. Whether the Department's response to Mr. Friedt was timely under the open records law.
4. Whether the charge for the information furnished was appropriate under the open records law.

ANALYSES

Issue One:

All records of a public entity are open and accessible to the public unless otherwise specifically provided by law. N.D.C.C. § 44-04-18(1); N.D. Const. art. XI, § 6. A denial of a request for records must describe the legal authority for the denial. N.D.C.C. § 44-04-18(6).

In this case, the Department initially advised Mr. Friedt that as a matter of policy the Department no longer provided information on the location of prairie dog towns. There is no specific exemption from the open records law for the records Mr. Friedt requested. An agency policy that withholds certain records without an exemption pertaining to the records in question is not a valid legal reason for denying access to or copies of the records. Therefore, it is my opinion that the Department violated N.D.C.C. § 44-04-18(1) when it initially denied the request for information.

Issue Two:

State law provides that “[a] request [for records] need not be made in person or in writing.” N.D.C.C. § 44-04-18(2). The Department asked Mr. Friedt to put his request in writing. According to the Department, the Department representative was not familiar with the requested information, and wanted to check with the Department’s technology employees to determine whether the Department could provide the information in the requested format and to determine what would be involved in providing the information. While it is a clear violation of N.D.C.C. § 44-04-18 to require that a request for open public records be made in writing, the request in this case was done to facilitate the provision of the requested information. Under these circumstances, the staff person’s actions were not a violation of the open records law. To avoid similar problems in the future, however, whenever a public entity asks that a request be in writing, the entity should advise the requester that doing so is not a prerequisite to obtaining access to or a copy of a record.

Issue Three:

A response to a request for copies must not be “unreasonably delayed.” N.D.C.C. § 44-04-18(7). Once a person makes a request for open records, it is the responsibility of the public entity to respond to the request within a reasonable time, and the requester is not required to contact the entity again to find out when the records will be provided or made available. N.D.A.G. 01-O-12; N.D.A.G. 98-O-04. This office has stated that when determining whether a delay in responding to a request for information is reasonable, it will look at hours and days, not weeks. N.D.A.G. 98-O-22. Whether a response has been

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provided within a reasonable time will depend on the facts of a given situation. N.D.A.G. 98-O-04.

In late February 2003, Mr. Friedt first asked for records of the locations of prairie dog towns. The Department denied the request based on an invalid reason. Mr. Friedt returned on March 24, 2003, and again requested records of prairie dog town locations. This time he was asked to put his request in writing. He returned a third time in April seeking the records. It was not until sometime in April that the Department determined it did not have the records in the format Mr. Friedt desired. Instead of advising him of that fact, the Department generated a new record containing the information Mr. Friedt asked for in the format he wanted.

Generally, a public entity is not required to create or compile a record that does not exist. N.D.C.C. §44-04-18(3).¹ Although the Department in this case went beyond the legal requirements of the open records law to generate a record containing the specific information requested from certain computer records, a proper response would have been for the Department within a matter of days to identify and explain to the requester the type of information it did have regarding the location of prairie dog towns to see if the requester wanted any of that information. Under the circumstances of this case, the Department's response to the request for information was unreasonably delayed.

Issue Four:

The Department charged 50 cents for the five pages of information (or 10 cents per page), 37 cents for postage, and \$25 for locating the information after the first hour. Public entities may charge for the cost of making, mailing, and locating copies of open records. N.D.C.C. §44-04-18(2). When making copies, a public entity may charge the entity's actual cost, including labor, materials, postage, and equipment. Id. An entity may also charge up to \$25 per hour after the first hour for time required to locate the records. Id.

In this case the Department determined within the first hour of searching its records that it did not have a record in a form requested by Mr. Friedt. The additional time for which it charged \$25 apparently involved discussing the request and converting the data from certain electronic files to a text format by use of specialized software. Because the Department was not required to create a record, it may not charge for that process. See N.D.A.G. 2000-O-11 (concluding that a public entity could not charge for compiling a

¹ The open records law requires a public entity to create or compile a record under limited circumstances involving electronically stored records. A public entity is required to provide an electronically stored record in a different structure, format, or organization when reasonably necessary to reveal the organization of data contained in the electronically stored record. N.D.C.C. § 44-04-18(3).

spreadsheet containing information on note cards which could have been photocopied). In addition, the \$25 fee may be charged only for an extended period of time locating data, not for the time it takes to put the data in a different format.

The document generated was a record for which a copying charge can be made. The Department's actual cost of making copies of the pages for material and equipment was 2 cents per page, but that did not include labor which is usually the most expensive component. N.D.A.G. 2002-O-04. The per-copy charge of 10 cents is appropriate if this represents the Department's actual cost of making the copy, including labor. The copies were not mailed so the 37 cents postage and the \$25 locating fee should be refunded to Mr. Friedt.

CONCLUSIONS

1. The Department violated N.D.C.C. § 44-04-18(1) when it denied records citing the agency's "policy."
2. The Department did not violate N.D.C.C. § 44-04-18(2) when it asked the requester to put his request in writing in this case in order for the Department to ascertain the detail of information being requested.
3. The Department violated N.D.C.C. § 44-04-18(7) when it failed to respond within a reasonable time to Mr. Friedt's request.
4. The charge of \$25 for locating a record is not allowable because it was for the time spent creating a record, rather than locating a record. No mailing charge can be made because the information was not mailed.

STEPS NEEDED TO REMEDY VIOLATION

The Department is required to refund to the requester \$25.37, the impermissible charge for locating the record and postage. In addition, the Department should determine its actual cost of making the copies, including labor. If the cost per copy is less than 10 cents, the requester should be reimbursed for the amount he paid above the actual cost. If the cost per copy is more than 10 cents, that amount should be deducted from the \$25.37 being refunded to the requester. Because Mr. Friedt has received the generated record, no further steps need be taken to remedy the violations.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable

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attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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